COURT OF APPEALS
DECISION
DATED AND RELEASED

April 22, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1612

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

ESTATE OF HAROLD LARSON,

PLAINTIFF-APPELLANT,

v.

FOREST HILL MEMORIAL PARK, TAMINI KUBASH AND TOM POMIANEK,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: FRANK T. CRIVELLO, Judge. *Reversed and cause remanded.*

FINE, J. The Estate of Harold Larson appeals from an order entered by the trial court reaffirming its dismissal of the Estate's complaint seeking a refund of money paid for a cemetery marker, denying the Estate's motion for reconsideration, and awarding to Forest Hill Memorial Park $100 in motion costs. We reverse.

The Estate ordered a bronze memorial marker for the grave of the deceased. The contract between the parties, a purchase agreement on Forest Hill's form, did not set the standards for performance other than giving to the Estate's representative the right to "view & approve marker." The Estate's representative rejected the marker, which was then redone. The new marker was also rejected as not in conformity with the art-work from which the marker was to be made. The trial court, after a bench trial marked by expressions of the presiding judge's unwarranted impatience, for which he at one point apologized on the record, determined that the Estate's failure to adduce expert testimony that the marker did not meet industry standards was fatal to its claim.

Although terse, the parties' contract gave to the Estate the right to approve the marker. A contract thus subject to a condition is not enforceable unless that condition has been satisfied. ***Locke v. Bort***, 10 Wis.2d 585, 588, 103 N.W.2d 555, 558 (1960). The failure to approve must, however, be reasonable and not arbitrary. *See* ***Jonas v. Walgreen Arizona Drug Co.***, 511 F.2d 1206, 1210 (9th Cir. 1975). The trial court found that there was a variance between the art-work submitted to the defendants by the Estate. Thus, it cannot be said on this record that the Estate's rejection under the "view & approve" provision of the contract was not reasonable—the burden on this sub-issue lying with the defendant.[1] *See* ***Anderson v. Anderson***, 147 Wis.2d 83, 88, 432 N.W.2d 923, 926 (Ct. App. 1988) (party seeking invocation of exception has burden of proof). The trial court, however, erred in substituting an "industry standard" for the parties'

[1] Neither the marker nor a photograph of the marker is in the appellate record. *See* RULE 809.15(1)(a)(9), STATS. (The record on appeal shall include "[e]xhibits material to the appeal whether or not received in evidence."); RULE 809.15(2), STATS. (The parties receive ten-day notice of the provisional contents of the record prior to its transmittal to the appellate court.).

bargain. The order dismissing the Estate's claim is reversed and, inasmuch as this court cannot find facts, ***Wurtz v. Fleischman***, 97 Wis.2d 100, 107, 293 N.W.2d 155, 159 (1980), the case must be remanded to the trial court for a new trial for a determination on whether the Estate's failure to approve the marker was reasonable.

The Estate also appeals from that portion of the trial court's order directing its payment to the defendants of $100 in costs on the Estate's unsuccessful motion for reconsideration. First, motion costs are limited to $50. RULE 814.07, STATS. Second, in light of our decision on this appeal's major issue, the trial court's order imposing motion costs is vacated.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.